United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6153

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FRANK A. DE LORENZO,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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STATEMENT OF THE ISSUE PRESENTED

Whether the District Court was correct in determining that a judgment should be entered against the tax payer in the amount of $2,801.44.

STATEMENT OF THE CASE

The United States of America seeks to appeal a judgment of the United States District Court for the Norther District of New York, dismissing the complaint of Frank A. De Lorenzo (Appellee-tax payer) against the United States of America and upon the counter-claim of the defendant United States of America (Appellant) to recover $10,956.50 against the Appellee on which the Court ordered that a judgment in the amount of $2,801.44 be entered in favor of the defendant against the plaintiff-tax payer. The plaintiff-appellee paid the judgment

of $2,801.44 subsequent to its entry of July 9, 1976. The Court as a basis for rendering its judgment applied the formula used by the defendant-appellant (United States of America) for assessing the tax and the defendant now in its appeal seeks to use that portion of the formula that is favorable to its case and to disregard that portion that is unfavorable.

QUESTIONS PRESENTED TO THE LOWER COURT
BY PLAINTIFF-APPELLEE (TAXPAYER)

(a) Whether the Internal Revenue Service (Defendant) wagering tax assessment was erroneous in that the method used to calculate the tax was an arbitrary, illegal and outrageous abuse of an Internal Revenue Agents discretion and whether the means used to calculate the tax was based upon factitious and hearsay information.

(b) Did the total amount of wagers used by the Internal Revenue Service in calculating the tax belong to the plaintiff.

(c) Did the Internal Revenue Service in calculating the tax use the proper number of days that plaintiff was under surveillance.

(d) Was the wagering information given to Internal Revenue Service so factious, speculative, unsupportive that it should be disregarded.

(e) Did the Internal Revenue Service abuse its discretion in assessing the tax against the plaintiff.

STATEMENT OF FACTS

On certain days between the week of August 1 to September 26, 1967 a surveillance of the plaintiff by the New York Police in the City of Schenectady was conducted on the suspicion that he was engaged in wagering activities. Plaintiff was arrested on October 4,

1967 on criminal charges of gambling along with two other persons. All three people including the plaintiff pleaded guilty.

At the time of plaintiff's arrest he was immediately taken into custody where he was asked to empty his pockets, the only gambling paraphenalia on his person was one envelope which contained 16 betting slips along with $284.00 in cash. The plaintiff was subsequently issued a receipt by the New York State Police Department for $284.00 in cash and 16 betting slips containing wagers in the amount of $434.75.

At the time of plaintiff's arrest the New York State Police also searched his store (The Bel Air Men's Clothing Store) and on the premises at the time of police raid was Al Puglio a salesman employed by plaintiff who had in his possession in the store $1,563.47 in gambling wagers. The police charged Puglio with possession of gambling records, a charge to which he pleaded guilty (R8). The Plaintiff-appellee denied in Federal Court that the wagers found in the possession of Al Puglio were his and testified that the only wagers that belonged to him were those found in his pockets at the time of his arrest (R6) and that Al Puglio had his own gambling customers.

Upon learning of the raid through a local newspaper, Peter Letko, an Internal Revenue Agent commenced an investigation of taxpayers liability for the federal excise tax on wagers. The revenue agent stated that he calculated the excise tax by using the number of days that New York State Investigator O'Hay (now deceased) told him plaintiff was under surveillance (R43) which was 56 days times the total number of wagers that were confiscated on plaintiff's person and in plaintiff's clothing store.

Mr. Letko stated that he had no personal knowledge of the surveillance of plaintiff and that all of the information used in calculating the tax came from the State Police (R50). He further stated that the State Police did not give him the information in affidavit form or even in writing, nor did he do anything to conduct his own independant investigation or survey (R50-51). In fact, contrary to the statement made on page 8 of Appellants brief, Mr. Letko stated that he would have used any number of days in his calculations that the State Police told him that they had plaintiff under surveillance. If the State Police said 5 days he would have used 5 days and if they told him 200 days he would have used 200 days (R51). Mr. Letko then testified that some of the betting slips had the name of Al Puglio on them and that Investigator O'Hay told him that Al Puglio was an employee of the Bel Air Men's Shop and that all the bets should be combined together (R54). He was asked if he ever made a claim against Al Puglio and his reply was no and that he took the investigators word that all the wagers belonged to Mr. De Lorenzo (Plaintiff). Mr. Letko stated on (R56) that slips with Mr. Puglio's name on them totaled $518.00 in horse bets, $802.00 in baseball, $210.00 in policy for a total of about $1,700.00 and sheets with Mr. De Lorenzo's (Plaintiff-taxpayer) name on them had horse bets in the amount of $366.50 and policy bets in the amount of $68.25 for a total of $424.75. Mr. Letko told the Court that he credited all the bets to Plaintiff (R57) because the State Police told him to do that and that he took all the bets that were on Mr. Puglio sheets and all the bets that were on Mr. De Lorenzo's sheets and said that Mr. De Lorenzo (Plaintiff) was doing $111,815.26

(R58). This figure was arrived at by mutiplying the number of days plaintiff was alleged to have been under surveillance times the total number of wagers attributed to the plaintiff.

Investigator James A. Gasbara of the New York State Police Department testified approximately 9 years after the arrest of plaintiff without notes or records of the incident. While he attempted to give the appearance that he knew the exact number of days he had plaintiff under surveillance, after a 9 year period of time his best answer was only an estimate of the time involved.

He stated to the Court that he did not start his surveillance until sometime during the week of August 1 and ended his duties on September 26 certainly not 56 days (R15-16) and that during the time he kept plaintiff under surveillance only about 1½ hours on certain days (R17) that there were days when plaintiff was not under surveillance at all (R18). In fact, he testified that plaintiff was not under surveillance at least one-third of the time (R18) and that was only an estimate.

THE PLAINTIFF HAS MEET THE BURDEN OF PROOF NECESSARY TO SUCCESSFULLY REBUT THE CORRECTNESS OF THE COMMISSIONERS ASSESSMENT.

It is an established principal that, in a tax case, the assessment of the Commissioner is presumed to be correct. The presumption is not conclusive and can be rebutted but only by competant evidence. In order to be successful at trial, the presumption that the assessment is correct places a two fold burden upon a taxpayer. First, the taxpayer must show that the Commissioner's assessment is wrong and secondly the taxpayer must demons rate the exact amount of the taxes he owes.

Helvering v. Taylor 293 U.S. 507, 514 (1935) Compton v. United States 334 2d 212. The plaintiff has no quarrel with the decisions cited by the appellant and asserts that he has meet in both instances, the burden of proof established by the Court. First, the plaintiff has shown during the course of the trial that the defendant's assessment was wrong and secondly that he has demonstrated the exact amount of taxes he owes.

The defendant (United States Of America) used a certain formula for calculating the plaintiff's tax and it is plaintiff's contention that not only was the method used in arriving at the assessment arbitrary, speculative, illegal and an outragious abuse of the Internal Revenue Agent's discretion but that the figures used in the formula were incorrect, factious and based upon hearsay evidence.

It was defendant's contention that since the plaintiff did not keep books or records showing on a daily basis the gross amount of bets placed with him, or the amount of wagers attributed to each type of gambling activity on which he accepted bets the only way that they could calculate his tax was by taking one day's receipts and assume that plaintiff did the same volume of business for each day that he was kept under surveillance.

That assumption borders on the ridiculous because at least $802.00 were wagers on the World Series (R56) and it is a known fact that the maximum number of games in the series is "seven" so therefore it was impossible for plaintiff to do the same volume of business each day of the period in question and the entire method used by the defendant in calculating the tax should have been thrown out of Court.

But while the method used by the defendant in calculating the tax was certainly a most inaccurate process to say the least they should at least be able to substantiate the figures used in their formula. Therefore the questions to be answered were how much wagering business did plaintiff do on the day he was arrested? And how many days prior to the time was he under surveillance.

The Internal Revenue Service relied on the plaintiff's one day records to assess his tax and the plaintiff is relying on the same records to establish what he feels he truly owes as a tax on his gambling activities. If the defendant can use plaintiff's records to assess the tax certainly plaintiff should be entitled to use his own records to prove the assessment was incorrect.

In attempting to accuratly calculate the tax liability of the plaintiff if seems that the proper place to begin is the areas where there is no dispute.

It is uncontraverted that the plaintiff, at the time of his arrest, was given a receipt for 16 betting slips and $284.00 in cash. Senior Investigator O'Hay told Agent Letko that the 16 slips totalled $434.25 and while the plaintiff stated that he assumed he only accepted wagers in the amount of $100.00 to $150.00 a day and that the rest of the wagers were probably for different days, his only records were those seized by the State Police and he will have to rely on those records that state the wagers totalled $434.25.

It is also uncontraverted that the plaintiff was not under surveillance for 56 days. The question to be resolved is just how many days was he under surveillance. The only police officer who

was assigned the task of keeping the plaintiff under surveillance was Officer Gasbara and he stated that he did not start his job until the first week of August and ended on September 26, 1967 and that he did not observe the plaintiff at least 1/3 of that time.

Mathmatically this would reduce the 56 days to less that 30 days taking into consideration Sundays. Investigator Gasbara had no notes or records pertaining to the exact number of days he kept the plaintiff under surveillance and it seems that it can be assumed from the tenor of Investigator Gasbar's testimony that as a practical matter the surveillance amounted to a lot less that 30 days.

When Investigator Gasbara established the length of time that he conducted his surveillance the Court had the opportunity to observe the witnesses and to assess the weight of the testimony. Certainly the Court in listening to the witnesses testimony 9 years after the incident took place, that he kept plaintiff under surveillance 1/3 of the time between August 1 and September 26, did not take Investigator Gasbara literally.

The Court did not error in its calculation of the number of days plaintiff was under surveillance and arrived at its own conclusions, after treating Investigator Gasbara's estimate as just that "an estimate" and came up with the conclusion that Investigator Gasbara at best could have had plaintiff under surveillance only 19 days plus the day of his arrest.

Plaintiff in his brief to the Court after trial stated "Certainly based upon the evasive and ellusive testimony of Officer Gasbara, plaintiff should be given the benefit of any doubt and it is most

likely that plaintiff was under surveillance for 20 days." The Court in its decision accepted this reasoning when Judge Foley stated in his decision that "After hearing and observing the witness, it is my finding that there was an apparent misunderstanding or misinformation given to Agent Letko during his investigation of plaintiff's tax liability in terms of the number of days plaintiff was actually under surveillance by the State Police. Agent Letko, I find relied in good faith upon this information, but nevertheless the mistaken reliance demonstrates that an ecessive amount of tax was assessed and the evidence in regard to actual surveillance days indicates, in, my judgment, the correct amount that should be assessed against amount collected from plaintiff."

The Court in its decision then stated "... Whatever the explanation for the 56 days figure, it was not shown to be rationally based on any fact recited during the hearing" and then again the Court stated "In my judgment there is no factual basis for the 56 factor in the government's assessment. It is an arbitrary figure that I find not only lasking support in the evidence but really contradicted by it...".

The Court in arriving at the conclusion that the surveillance of Officer Gasbara lasted only 19 days used the officers estimate as just that "an estimate".

In disbute at trial in addition to the number of days plaintiff was under surveillance was the amount of wagers used in calculating the tax.

Unfortunately Senior Investigator O'Hay who had participated in the arrest at the Bel Air Men's Shop and who gave Agent Letko all of

his information is now deceased, so we have to look at what must have logically taken place. Certainly, the plaintiff is entitled to have the truth inferred from facts introducted into evidence. It seems that if the betting slips seized at the raid on the Bel Air Men's Shop had been secreted in a private place they would have been determined to be those of plaintiff and Al Puglio would not have been arrested for accepting those wagers. Certainly Al Puglio could not be held responsible for wagering slips found in a place under control soley of the plaintiff, and to follow this premise through to a logical conclusio.. Al Puglio would not have pleaded guilty for a crime he did not commit and the plaintiff would not have let Puglio plead guilty for something he was not responsible for. Al Puglio was never assessed any tax because he had no assets. In addition Officer Cregan testified that plaintiff was Given a receipt for all the evidence that was seized from him and that receipt was only for 16 betting slips and $284.00 in cash. he evidence taken from the Bel Air Men's Shop was considered to be the plaintiff's it would have been entered on the receipt given to him.

Therefore it was plaintiff's contention before the trial Court that the wagers that were found in the Bel Air Men's Clothing Store should not have been used by Internal Revenue Agent in assessing the tax.

THE COURT WAS CORRECT IN NOT CHANGING THE FORMULA USED BY THE DEFENDANT IN ASSESSING THE TAX.

The defendant established a certain policy and procedure for calculating the plaintiff's assessment. Becuase of the defendant's inability to substantiate and prove the exact number of days it used

in its formula to arrive at the plaintiff's assessment it now wants the Court to change the method used by the Internal Revenue Agent Letko in assessing the tax and to subjectively determine how Mr. Letko would have proceeded had he been able to discuss the matter with the plaintiff prior to determinity the liability. The defendant is asking the Court to become an administrative agency by changing one of the elements used in arriving at said assessment.

The falicy behind that arguement is that had the Internal Revenue Agent been able to talk to the Plaintiff prior to the time he made the assessment he may have used a different method to arrive at the tax. In all likelihood he would not have used one days wagers as a precedent to prove 56 days of business but would have used a more accurate means to determine the actual amount bet during the period of time in question.

The defendant would now like the Court to use the testimony that is most favorable to its case and to disregard the remainder of plaintiff's testimony.

The plaintiff testified honestly and truthfully that he was a bookmaker and when he was asked the number of dasy he was in business his answer of 5 or 6 days a week was at best an estimate. It the defendant wants the Court to accept this testimony as an actual fact it should also in all fairness ask the Court to accept the fact that plaintiff stated that the only wagers be accepted were those found on his person in the amount of $434.75. The plaintiff established that he did $10,000.00 worth of business between August 1 and October 4, 1976 and that at 10% his tax liability should be only 1,000.00.

CONCLUSION

That while the plaintiff alleges that the method used by the defendant is assessing the taxes was illegal, speculative and an arbitrary abuse of discretion. The plaintiff respectfully asked the Court

(a) To affirm the decision of the Lower Court.

or in the alternative

(b) To dismiss the counterclaim of the defendant.

Respectfully submitted

Davis M. Etkin